

TAB 19

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

TRANSCRIPT OF PROCEEDINGS

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:
THE CITY OF HUNTINGTON, : CIVIL ACTION
:
Plaintiff, : NO. 3:17-cv-01362
:
vs. :
:
AMERISOURCEBERGEN DRUG :
CORPORATION, et al., :
:
Defendants. :
:
-----X

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:
CABELL COUNTY COMMISSION, : CIVIL ACTION
:
Plaintiff, : NO. 3:17-cv-01665
:
vs. :
:
AMERISOURCEBERGEN DRUG :
CORPORATION, et al., :
:
Defendants. :
:
-----X

VIDEO PRE-TRIAL CONFERENCE

BEFORE THE HONORABLE DAVID A. FABER
SENIOR UNITED STATES DISTRICT JUDGE

MARCH 18, 2021

P R O C E E D I N G S

THE COURT: I guess we're ready to go here.

The case is the *City of Huntington and Cabell County Commission against AmerisourceBergen Corporation and others*. The Civil Actions are 3:17-1362 and 3:17-1665.

I set this matter for oral arguments on pending motions to -- a motion for summary judgment on the nuisance question and also the issue of proximate cause.

Okay. Can everybody hear me?

(All participants answered in the affirmative.)

THE COURT: Okay. We'll take up the nuisance issue first.

Mr. Heard, are you going to argue that?

MR. HEARD: Yes, Your Honor, I am. Thank you for the opportunity to address this motion.

We have come full circle I think. It's been almost three years since I first addressed the question of public nuisance with you back in 2017. I think we've sharpened our thinking since then.

What I'd like to do this morning, Your Honor, is put two propositions to you, state them here at the beginning. And then I'd like to step back very quickly to provide two points of context, one that's procedural and one that's factual. And then I'll go back to these two propositions and dive into them in a little bit more depth.

1 The first proposition is this: That West Virginia law
2 has never recognized a public nuisance claim where the gist
3 of the complaint is that a product causes personal injuries
4 that in turn causes emotional distress or economic loss.

5 Plaintiffs are asking this Court to go where the West
6 Virginia Supreme Court has never gone, against the general
7 trend of the case law, and where the Third Restatement says
8 public nuisance is not meant to go.

9 Now, the second proposition is this: That the *sine qua*
10 *non* of a public nuisance claim is interference with a public
11 right which by definition is not the right that everyone
12 has. I could be assaulted or defamed or defrauded or
13 negligently injured. But it is that very right not to be
14 negligently injured that is at the heart of this case. And
15 the Restatement says that is a private right, not a public
16 right.

17 And the importance of this proposition, Your Honor, is
18 the plaintiffs dodge this issue. And if Your Honor comes to
19 grips with it head-on and makes this distinction, comes
20 head-on and deals with this distinction between public and
21 private right, you will be only the second court in this
22 litigation to do so. And we think that's a fundamental
23 distinction.

24 So before going into these two propositions, let me
25 make this one -- these two statements about background.

1 The statement about procedural background is obvious,
2 but I think it's important to restate. That is, that the
3 plaintiffs in this litigation elected to sever and put on
4 the back burner all of their claims against all of the other
5 defendants, which is more than 50, all the manufacturer and
6 pharmacy defendants.

7 And the second choice they made was to dismiss all the
8 claims in this case except nuisance. That's a choice they
9 made.

10 The second point of background is factual. And I think
11 it's useful here as we get closer to trial where we are so
12 in the weeds about facts and a lot of the language of legal
13 argument is to step back and take some perspective on this
14 public nuisance claim.

15 And consider -- I'm going to tick off some things, Your
16 Honor. Consider these facts which are undisputed at this
17 point:

18 First, these defendant distributors are licensed by the
19 state and registered by the DEA to distribute prescription
20 opioids to pharmacies that are themselves licensed and
21 registered.

22 Second, that no distributor ever distributed any
23 prescription opioids to a pharmacy customer that was not
24 licensed and registered.

25 Third, that no distributor ever distributed

1 prescription opioids to anyone other than a licensed
2 registered pharmacy.

3 Fourth, that no pharmacy customer of any of these
4 defendants ever dispensed prescription opioids to anyone
5 without a doctor's prescription.

6 Fifth, that none of the distributors by some negligence
7 in their physical security caused these drugs to get lost
8 or, you know, emerge from the warehouse and get out into the
9 community.

10 And, sixth, defendants reported every single shipment
11 of prescription opioids to the DEA such that the DEA knew
12 quarter by quarter, year by year the total volume of opioids
13 that were going into Cabell Huntington and, indeed, knew the
14 total volume of opioids that were going to every -- each and
15 every pharmacy in Cabell.

16 And with that knowledge, the DEA increased the (video
17 inaudible) from 1995 to 2010 and told Congress in testimony
18 that 99 percent of doctors were prescribing (video
19 inaudible).

20 And, Your Honor, I bring to you that there is nothing
21 remotely like this in the public nuisance of West
22 Virginia -- public nuisance law of West Virginia over the
23 last 150 years.

24 West Virginia public nuisance law is about things like
25 coal dust and soot and smoke from a dye works factory and

1 roads that get blocked, and odor, ammunitions factories,
2 junk yards in the middle of town. They are cases like the
3 *Smithfield* case that you handled in North Carolina that
4 involved odor, nausea-causing odor from the operation of hog
5 farms.

6 That's what West Virginia public nuisance law has been
7 all along, nothing remotely like this. And the plaintiffs
8 cannot cite you a single case in West Virginia, in fact
9 elsewhere, that's even like that.

10 THE COURT: Well, what do you have to say on that
11 point about the opinions by Judge Hummel and Judge Thompson
12 that do create some West Virginia law that's against you
13 here, Mr. Heard?

14 MR. HEARD: Well, Your Honor, I have to -- I have
15 this to say about those cases.

16 First, there's no West Virginia Supreme Court
17 authority. So of these seven decisions -- and they're at
18 page -- as Your Honor knows, they're at Page 11 of the
19 opposition. Of the seven decisions they cite, West Virginia
20 decisions, five of the seven are unpublished. Six of the
21 seven contain not a word of analysis on this point about
22 whether a product-based or personal-injury-based claim can
23 support a public nuisance claim.

24 Judge Thompson's decision from Boone County, verbatim
25 adoption of the plaintiffs' findings of fact, not a word of

1 analysis as to this issue.

2 Judge Hummel's decision in the *Brooke County Commission*
3 case, verbatim adoption of the plaintiffs' findings of fact,
4 unpublished, one conclusory sentence that simply says public
5 nuisance isn't limited to land.

6 THE COURT: Do you -- I'm sorry. Go ahead, Mr.
7 Heard.

8 MR. HEARD: Judge Moats' order in the, in the Mass
9 Litigation Panel, unpublished, one sentence saying, "We're
10 not going to revisit Judge Hummel." Three one-paragraph
11 orders from the Supreme Court declining to consider writs of
12 prohibition.

13 In the *Lemongello* case, another Circuit Court opinion,
14 unpublished, one sentence, no analysis, no citation or
15 authority.

16 Your Honor, I would submit to you these Circuit Court
17 opinions can't even buy a ticket of admission for
18 consideration for *Erie* purposes. These kind of unpublished,
19 unreasoned, copied, verbatim decisions don't buy anything
20 more than a standing room ticket with an unobstructed view
21 of the upper reaches of the balcony. These are the weakest
22 kind of authorities.

23 THE COURT: And you don't attach any significance
24 to the fact that the Supreme Court declined to review those
25 cases?

1 MR. HEARD: No significance to that whatsoever
2 under West Virginia law. That has no persuasive data.

3 And, Your Honor, I would say here -- return to this
4 first question. This is first and foremost an impression of
5 *Erie*. And I would feel presumptuous even saying a word to
6 you about *Erie*. You've been sitting on the bench for 30
7 years. You've done this countless times.

8 So the only thing I would ask Your Honor to do is
9 consider three things:

10 One historical fact, one new case which I have to give
11 you, and to ask you to re-read one case that I know is
12 familiar to you.

13 The historical fact, as I've already alluded to, is
14 that there are 17 West Virginia Supreme Court opinions since
15 1878, an average of one every six years. There's no case
16 where the gist of the complaint was that a product causes
17 personal injury which results in emotional distress. That's
18 just not in West Virginia Supreme Court case law. And there
19 is abundant West Virginia Supreme Court case law. That's
20 the historical fact.

21 Your Honor, the new case that I would like to ask you
22 to consider -- and I regret that we overlooked it in our
23 briefing -- is *Callihan*, C-a-l-l-i-h-a-n, *Callihan* vs.
24 *Surnaik Holdings*. It's a 2018 decision by Chief Judge
25 Johnston of this court dismissing a public nuisance claim.

1 And this is what he said, and I quote:

2 "A public nuisance claim is an interference with land
3 use or enjoyment that affects the general public."

4 And that is the most recent West Virginia public
5 nuisance law by either the West Virginia Supreme Court or a
6 Federal Court.

7 And then the old case that I know you're familiar
8 with --

9 THE COURT: Did that case get published, Mr.
10 Heard?

11 MR. HEARD: It did. 2018 Westlaw 6313012, 6313012
12 in 2018.

13 Now, the older case is *Rhodes vs. Dupont*. That
14 involved contamination of the City of Parkersburg water
15 supply. But it sort of provides uncanny guidance here
16 because in that case, as here, the plaintiffs were asking
17 the court to predict that the West Virginia court would
18 adopt a rule it had never adopted.

19 But there it had to do with common law battery, not
20 nuisance but common law battery. Everybody in that case
21 agreed that the West Virginia Supreme Court had always held
22 that battery requires harmful bodily contact. They didn't
23 have that in that case. Nobody had personal injuries. They
24 were saying there were detectable levels of chemicals in
25 their blood. And they said that the Restatement, Sections

1 15 and 18, would recognize that as a battery.

2 But the Fourth Circuit in *Rhodes* affirming Judge
3 Goodwin said, no, the West Virginia Supreme Court has never
4 adopted that theory. It's never adopted those sections of
5 the Restatement and, in fact, has held that in every single
6 case that harmful bodily contact is required.

7 We have, we have just that scenario here. The West
8 Virginia Supreme Court has always applied this to misuses of
9 land or interference with land, never the products that
10 cause personal injury and emotional distress.

11 And on top of that, the Fourth Circuit sometimes says,
12 you know, if there's not Supreme Court authority, you can
13 look to general treatises, you can look to restatements, you
14 can look to general trends of the law.

15 Here we have from the Third Restatement the view that
16 it's inapt to apply public nuisance to claims like this.
17 And we have the Third Restatement saying, and I quote, there
18 is a clear national trend to limit public nuisance to land
19 use.

20 So if we look to the restatements, if we look to the
21 general treatises, if we look to the general trend of the
22 law in conjunction with the actions of the West Virginia
23 Supreme Court, this is a step too far from *Erie*.

24 Now, that takes us, Your Honor, to this first -- to the
25 second proposition which is a true intellectual challenge I

1 think.

2 Public nuisance requires interference with a public
3 right. And here we have at most interference with a private
4 right.

5 The one point on which the parties agree is that the
6 *sine qua non* of a public nuisance claim is interference with
7 a public right. Plaintiffs even plead it in their
8 complaint.

9 So the question is: What, what is a public right? And
10 the interesting and unavoidable fact is that the Restatement
11 defines public right both by what it is and what it is not.
12 It offers both an affirmative definition and a negative
13 definition. And it offers them in consecutive sentences.

14 It says that what a public right is is a right held in
15 common by the general public. And it says what it is not is
16 the right that everyone has not to be assaulted or defamed
17 or defrauded or negligently injured.

18 So the key to defining a public right is defining the
19 difference between a public right and a private right. And
20 we can be sure that if public right is defined so
21 expansively that nothing is left but the realm of private
22 right, then you've done something wrong.

23 But that's what every opinion in this litigation so far
24 has done. It has considered what is the public right
25 without even considering the Restatement's negative

1 definition that a public right is not the right that
2 everyone has not to be defrauded or negligently injured.

3 So let me, let me explain why this is a private right
4 and why it is not a public right.

5 It's about a private right, Your Honor, most simply
6 because every aspect of the claim has to do with personal
7 injury. The cause that's alleged, the harm that's alleged,
8 the remedy that's sought all have to do with personal
9 injury.

10 The cause is quite clear that -- every version of the
11 plaintiffs' complaint tells us that the originating cause of
12 the opioid epidemic in Cabell Huntington is a deceptive
13 marketing campaign by manufacturers that defrauded doctors
14 into overprescribing the drugs, a violation of the right not
15 to be defrauded the Restatement says is a private right
16 that's alleged.

17 From this overprescribing and misprescribing is an
18 epidemic of addiction and overdose deaths, a violation of
19 the right not to be negligently injured, which the
20 Restatement says is a private right.

21 And the remedy behind plaintiffs' expert reports,
22 \$2 billion. Out of \$2.6 billion that's asked for,
23 80 percent is for treatment of addiction, treatment of the
24 personal injuries.

25 So every aspect of this claim has to do with personal

1 injuries which in the Restatement definition is a violation
2 of the right that everybody has not to be either defrauded
3 or negligently injured.

4 Now, the question I think that raises, of course, is:
5 Does this understanding of private right that I've given you
6 mean that matters of public health never implicate public
7 rights? And the answer is, "No."

8 But it's crucial to look at the Restatement because the
9 Restatement, Comment G, explains the difference between
10 public and private right with reference to a public health
11 example. Now, what could be better for our circumstances
12 than that? And the example they give is of an
13 epidemic-causing contagious disease.

14 Now, it's noteworthy that the plaintiffs in their
15 opposition quote some general language from the Restatement
16 about public health. But what they don't do is look at the
17 examples that the Restatement gives us and then look at the
18 case citations that support those examples. And the
19 examples --

20 THE COURT: Let me interrupt you here and ask you
21 a question, Mr. Heard. It's on my mind and I'll forget it
22 if I don't ask it now.

23 There was a suggestion in the, in the brief on your
24 side -- and I don't know whether you wrote it or not, one of
25 your colleagues obviously did -- that if I threw out the

1 negligence claim, there would be other theories that the --
2 that were originally pleaded that the plaintiffs could go
3 back and adopt and, and give renewed viability to their
4 case.

5 I don't see any of those theories that I'm familiar
6 with that would run to the municipal corporations here as a
7 legitimate plan.

8 If it's a negligence case, it would be -- well, I think
9 of the asbestos cases. The -- this was a hugely harmful
10 commodity that permeated the whole country, the whole world
11 maybe, and the plaintiffs in all those cases were
12 individuals. None of them went to any governmental entity
13 that would have to clean up any of the mess.

14 I just want you to address the proposition in the brief
15 that if the nuisance claim goes out, the case is still
16 viable.

17 MR. HEARD: Let me address that in three ways,
18 Your Honor.

19 What we said in the brief and what I said in brief by
20 way of introduction this morning were these things.

21 The first prop -- the first thing is if Your Honor
22 dismisses the public nuisance claim, the case against the
23 distributors is gone. But the plaintiffs severed and
24 retained the claims against all the other defendants, which
25 number more than 50. And they maintain all claims against

1 those other defendants.

2 Now, the other thing I said was they elected to dismiss
3 their negligence, RICO, civil conspiracy, unjust enrichment
4 claims against these three distributor defendants. They
5 made that election. They made that bed and they have to lie
6 in it.

7 So Your Honor asks if they hadn't dismissed those
8 claims and Your Honor granted summary judgment here, now in
9 theory would they, would they have a viable negligence claim
10 or RICO claim or unjust enrichment claim. We say not. We
11 would argue not. But there's no way to test that because
12 they chose to dismiss those claims.

13 Your Honor mentions the asbestos or tobacco litigation.
14 And maybe this is sliding off your answer a bit, but I think
15 those litigations are telling because those certainly
16 implicated the public health in a colloquial sense.

17 But the courts recognized in those litigations that
18 those involved personal injuries and treated them as product
19 liability personal injury cases. No court ever seemed to
20 think that those sustained a public nuisance claim.

21 In fact, they were dismissed because when the insurers
22 did what the city and county seek to do here, which is say,
23 "Well, we were economically harmed," they will incur
24 economic costs in the future, the Court said that's a
25 derivative claim and they dismissed it. They didn't say

1 that's a public nuisance claim and uphold it.

2 If that is an answer to Your Honor's question -- I want
3 to leave no doubt that there are occasions when interference
4 with a true, with a true public right can also implicate the
5 public health.

6 The Restatement gives the example of contagious
7 disease. It says the threat of communication to smallpox to
8 even one person can constitute a public nuisance claim
9 because of the possibility that it can uncontrollably
10 spread.

11 And the companion example that the Restatement gives
12 has to do with a fire hazard. If I maintain a fire hazard
13 on my property, the Restatement says that may constitute an
14 interference with public right because of the risk of
15 conflagration. The fire may uncontrollably spread.

16 And what that shows us is that an interference with the
17 public right and an interference with public health
18 intersect when the public health problem interferes with our
19 ability to be in public, to exercise our public rights, to
20 congregate in public, to travel in public in the very way
21 that our lives in that regard have been hampered over the
22 last year by the COVID-19. We've all experienced this very
23 example the Restatement gives us in the last 12 months.

24 And you see that even further if we go down a layer in
25 the Restatement to the case citations that support these two

1 examples because the case citations are all about
2 interference with public right and interference with public
3 health as a manner of the spread of disease.

4 So the examples and the case citations are maintenance
5 of a malarial pond, defective sewers, keeping diseased
6 animals on property, maintenance of a hog pen where the
7 Court's discussion indicates that dead carcasses were left
8 lying around threatening the spread of typhoid fever and
9 scarlet fever, and two cases involving the unlicensed
10 practice of medicine where the case discussion explicitly
11 says if you've got an unlicensed doctor, there may be a
12 failure to maintain sanitary methods to prevent the spread
13 of disease.

14 So that's what we're missing here. We don't have a
15 matter of public health in a colloquial sense, but we don't
16 have interference with a public right in the way that
17 contagious disease interferes with the right of the
18 public -- ability to exercise public rights and be in a
19 public sphere.

20 And that takes us, I think, to the answer, Your Honor,
21 to the question of why is this case not about interference
22 with a public right.

23 Looking again at that first half of the definition in
24 the Restatement, the affirmative definition, a right held in
25 common by the general public. A right held in common is

1 collective in nature. It's collective in nature because
2 historically it's involved interference with indivisible
3 resources; the air we breathe, the water we drink, the
4 waterways we navigate, the public spaces in which we
5 congregate, the public roads on which we travel.

6 It is not the right not to be negligently injured
7 because while those are rights everyone has, they're rights
8 that everyone has individually, not collectively. And, so,
9 the Restatement says those are private rights.

10 And this is not interference with a public right
11 because it's not interference with those collectively held
12 public resources. We're not talking about a public health
13 problem like contagious disease that keeps us from being in
14 public or traveling in public, you know, being in this
15 courtroom in public.

16 One doesn't catch addiction. It's not a contagious
17 disease. And, so, it's a private right because every aspect
18 of the claim is personal injury. It's not a public right
19 because it's not about these rights held in common
20 collectively regarding indivisible resources.

21 So last of all, Your Honor, my last point is to say,
22 well, what are the plaintiffs arguing here? What is their
23 argument for why this is interference with a public right?

24 Now, as to Pages 3 to 5, 3 to 6 of their brief, they
25 actually call upon deposition testimony to make the case for

1 why this is interference with a public right. And I think
2 there are two aspects, but they substantially overlap.

3 One is to say there are a lot of people who have been
4 addicted and overdosed, so there's something going on about
5 the large numbers of people who have been affected by
6 addiction and overdose.

7 And, secondly, there's a statement on their part that
8 the whole community is affected. And the line in the brief
9 is "no one has been left untouched."

10 I invite Your Honor to go back and look at those
11 examples because when they say no one has been left
12 untouched, they refer to law enforcement, first responders,
13 healthcare providers, and friends and family of the addicted
14 and the dead.

15 And the testimony they cite goes like this. These are
16 paraphrases. They refer to law enforcement and first
17 responders who have been exposed to trauma; the first
18 responders, quote, who go into houses where mothers have
19 overdosed. It's answering the same emergency call for the
20 same person two or three times a day. It's my partner who's
21 dead because she overdosed. It's testimony that all
22 children know about -- all children know about growing up is
23 death.

24 And what's clear about those examples -- and this is
25 the argument of interference with a public right. They are

1 describing the emotional distress of bystanders, bystanders
2 who have witnessed personal injury.

3 And there is no more well established rule in West
4 Virginia common law that the only marital and blood
5 relations can recover for the emotional distress of
6 witnessing of another.

7 What plaintiffs are really trying to do here is
8 circumvent that common law rule and actually upending it and
9 turning it on its head because they would say if there are
10 enough people personally injured and there are enough
11 bystanders who have witnessed that personal injury day in
12 and day out, then what has historically been prohibited
13 recovery under West Virginia law, no bystander recovery,
14 somehow becomes attached to a public nuisance. And that has
15 to be wrong. There's no support in West Virginia law to
16 that.

17 So, Your Honor, I would say in summary they chose to
18 drop all the things of public nuisance. And I submit to
19 Your Honor they did that because the remedy for public
20 nuisance is sometimes abatement. And for them, they believe
21 abatement -- with abatement, the sky's the limit. That's
22 why they made that election.

23 They're asking the Court to go where no court has gone
24 before in saying that West Virginia public nuisance law
25 encompasses products that cause personal injury that, in

1 turn, lead to widespread emotional distress and economic
2 loss.

3 And precisely because this is about products that cause
4 personal injury, it's not about interference with a public
5 right. If Your Honor does what no other court has done and
6 makes this distinction between public and private right that
7 the Restatement definition requires, this is interference
8 with a private right, not with the indivisible, collectively
9 held public resources that give rise to a public right and
10 that implicate the public health when there's something like
11 the spread of disease involved.

12 Thank you, Your Honor.

13 THE COURT: Thank you, Mr. Heard.

14 I'm informed that Mr. Majestro is going to respond to
15 this. Is that correct? I don't have him up on the screen
16 here.

17 MR. MAJESTRO: Yes, Your Honor. Am I here now?
18 Can you see me?

19 THE COURT: Yeah. You're loud and clear,
20 Mr. Majestro. Go ahead.

21 MR. MAJESTRO: Thank you, Your Honor.

22 It's interesting to be back here responding to the same
23 argument that Mr. Heard made all those years ago. A lot has
24 happened since then, as he, as he explained. But he left
25 some things out and we're going to go over some of those.

1 And I would like to make some, some introductory remarks.

2 Defendants' arguments are essentially factually and
3 legally incorrect.

4 Factually, the defendants are mischaracterizing the
5 harms at issue because they're incorrectly arguing that only
6 individual product rights are implicated by the devastation
7 that the opioid epidemic has caused. And I'll go through
8 the evidence in more detail than Mr. Heard did.

9 But the evidence in this case shows exactly the
10 opposite effects. The effects of the opioid epidemic are
11 far-reaching throughout the community. And the public
12 nuisance law doctrine gives the public the right to be free
13 of this scourge which causes a substantial interference with
14 the public health and safety rights common to the general
15 public. And this is -- these are decisions that both --
16 that the courts all over the country in the context of this
17 litigation.

18 The defendants' argument misses the point because it
19 mixes up the distinction between a public nuisance case
20 brought by a private party and the broader case available to
21 a public entity seeking to enforce the public's rights.

22 And, so, when you look at the cases, the opioid cases
23 from around the country and, in fact, even at the Third
24 Restatement they cite, these distinctions are evident and
25 govern here.

1 A couple of points I want to make in response to Mr.
2 Heard's --

3 THE COURT: Do you have a case that specifically
4 is on point with regard to opioids that supports your
5 position?

6 MR. MAJESTRO: Sure, Your Honor. There are -- I
7 mean, we have lots of cases. If you want to go there now, I
8 was going to get to that in a bit, but let's -- let me go --
9 fast forward.

10 First, I would, I would point out, Your Honor, we have
11 the West Virginia cases that I think are -- it's important
12 that the West Virginia trial courts in opioid litigation
13 brought by public entities have unanimously rejected these
14 claims.

15 In addition, these -- by these defendants. And, in
16 addition, when these defendants sought to get review from
17 the Supreme Court of Appeals on prohibition, they've been
18 denied.

19 Now, those decisions aren't binding in the case, but we
20 would contend that the unanimity of those decisions under
21 West Virginia law should be persuasive to this, to this
22 Court.

23 The -- and I want to mention -- I what to mention
24 *Callihan*, the decision he raised for the first time.

25 Judge Johnston's decision in *Callihan* was a private

1 party pollution case arising out of a fire occurring on
2 land. So a discussion of whether or not nuisances occurring
3 on land, Judge Johnston did not hold that nuisances are
4 limited to land. He said nuisances occur -- nuisances on
5 land can constitute a public nuisance. And, again, that was
6 in the context of the private claim.

7 And I want to talk a little bit more about -- before we
8 get to the court cases, I want to talk a little bit more
9 about precedent in Federal Courts.

10 You know, we cite the applicable law on Page 11,
11 Footnote 2 of our brief.

12 In *Wells vs. Liddy*, under the *Erie* doctrine the Fourth
13 Circuit said Your Honor's task was to predict what the
14 Supreme Court will rule. The Court noted in doing so, you
15 can consider a broad range of sources, including trial court
16 decisions.

17 The Federal Practice and Procedure treatise notes while
18 Circuit Court decisions provide persuasive guidance to a
19 Federal Court sitting in diversity, particularly when
20 they're uniform, as here.

21 And even the U.S. Supreme Court case in the *Estate of*
22 *Bosch* case said that if there's no decision by the state's
23 highest court, then federal authorities must apply what law
24 they find to be state law after giving proper regard to
25 relevant rulings of other courts of the state.

1 So given the unanimity of what the West Virginia courts
2 have said in the context of this very litigation, we think
3 that that, that is persuasive.

4 You know, the --

5 Gina, can you pull up Slide 7? We'll see if it works
6 this time.

7 So back on June 27th, 2017, when I last argued this
8 motion, there was one decision in the United States dealing
9 with opioid litigation with respect to the question of
10 whether the opioid epidemic could constitute invasion of a
11 private right that, that would satisfy the public nuisance
12 test. That was Judge Thompson's opinion in the Boone County
13 case.

14 Let's look at -- and you will recall then, Your Honor,
15 that Mr. Heard said that -- we, we argued a lot about what
16 the, the gun cases and the lead paint cases and other cases.
17 And Mr. Heard offered the argument that the trend was
18 against me in that. But let's look what happened in the
19 context of these cases.

20 So on January 22nd, 2020, when this case got remanded
21 back to you, the decision by 17 states had confirmed that
22 the opioid epidemic results in interference with public
23 nuisance cases against these defendants and other defendants
24 in the distribution chain.

25 So it's California, South Carolina, three orders out of

1 Kentucky, two orders out of Alaska, orders in State and
2 Federal Court in Ohio, New Hampshire, the additional West
3 Virginia decisions, Minnesota, Tennessee, Vermont, Arkansas,
4 Florida, Rhode Island, New Mexico, Massachusetts, Alabama,
5 and Nevada.

6 Go to the next slide, Gina.

7 So then since then, we've had additional decisions from
8 Massachusetts, New York, Missouri, Vermont, Tennessee,
9 another New Mexico opinion, and another California opinion
10 which was decided, and we're going to provide that to you as
11 supplemental authority.

12 Just last week, the Circuit Court in the Santa Clara
13 opioid litigation brought by Santa Clara and Orange County,
14 California, rejected these same arguments regarding the
15 scope of public nuisance claim.

16 So that's a total of 20 states that have rejected these
17 arguments in the context of this very litigation.

18 Now, there's some -- to be fair, there are -- and
19 defendants have cited. There are some cases that have
20 dismissed public nuisance claims in opioid cases brought by
21 Attorney Generals in Delaware, Connecticut. Defendants
22 provided a recent decision in Illinois and, and South
23 Dakota.

24 But those decisions largely rely on prior decisions
25 from the Supreme Court in those cases which we would contend

1 have adopted a minority position rejecting nuisance claims
2 arising out of product cases like the lead paint and the gun
3 sales.

4 For example, the Illinois opinion felt -- the trial
5 court in Illinois felt it was bound by the Illinois Supreme
6 Court's *Beretta* decision which we don't think was the right
7 result anyway, but that Illinois court was bound by that
8 decision. So the majority two to one recognizes these
9 claims in the context of opioid litigation.

10 Now, interestingly enough, Mr. Heard is asking you to
11 rule that no other court -- to conduct an analysis that no
12 other court has done in these litigations. He's asking you
13 to -- he's saying all of these arguments that they've made
14 all across the country, every other court, including the
15 courts in West Virginia, got it wrong when they rejected it.
16 And he's asking you to apply this distinction that doesn't
17 exist in the context, context of nuisance law, a distinction
18 that it's important that he admit no other court has really
19 done this.

20 THE COURT: Well, the, the Illinois court in the
21 gun case and the Rhode Island court in the lead paint case,
22 those cases seem to me to hold just the opposite of what
23 you're asking me to do. How do you get around those cases?

24 MR. MAJESTRO: Well, those cases are, are -- you
25 know, there is -- in the context of the gun and the lead

1 paint cases, Illinois and Rhode Island went one way. Ohio
2 and California went another way on those cases.

3 The, the cases like -- and we have the -- the map I
4 have in Ohio, the opioid courts have, have gone our way, as
5 have cases in California.

6 In addition, the cases in all of these other
7 jurisdictions that don't have binding authority with respect
8 to lead or guns or something similar have, have also applied
9 the broad test in the Second Restatement and found opioid
10 cases are recognizable public nuisance cases.

11 And I want to deal with the, the Third Restatement
12 argument and -- because that's Mr. Heard's big point as to
13 why the trend exists on those.

14 And first I'd point out that the limitation to
15 property, the exclusion of products, no West Virginia case
16 holds that. There are cases involving -- unquestionably,
17 there are cases involving property damage or nuisances
18 arising out of property. And -- but there is not a case
19 that says you're limited to that or that, that products
20 claims are excluded.

21 In fact, in addition to the opioid litigation, the
22 *Lemongello* case that we cited dealt with guns. A West
23 Virginia Circuit Court has accepted a public nuisance case
24 arising out of guns.

25 Now, you know, I would be remiss if I didn't defend my

1 State Court judges that I appear regularly before. Their
2 decisions are maybe not to detail that maybe Your Honor
3 does. And it is -- as is common in West Virginia, the
4 courts, after ruling, allow submission of Proposed Findings
5 of Facts and Conclusions of Law which are often adopted by,
6 by those courts.

7 West Virginia law is clear that does not make those
8 decisions any less the law or any less the ruling of the
9 Court. The fact that, that, that the winning counsel
10 drafted the argument that was accepted by the Court is
11 indicative of the strength of the argument, not a reason to
12 disregard it.

13 So let's talk about the Third Restatement. The Third
14 Restatement has generally been viewed as a viable departure
15 from the settled standards of tort law. Itself indicates
16 that it's an almost total overhaul of the Restatement
17 (Second) in the introduction.

18 Unlike its predecessor which has been adopted all
19 throughout the country, and particularly with respect to the
20 Second Restatement's test for public nuisance, the Third
21 Restatement has not widely been adopted by the states.
22 Generally, in Kansas, Pennsylvania and Connecticut Supreme
23 Courts have rejected it.

24 More importantly, no state's highest court has adopted
25 Section 8 of the, of the Second Restatement unlike here

1 where in the -- in other contexts we have Supreme Court
2 opinions like California, like Ohio, like other places that
3 have adopted our view of the Second Restatement with respect
4 to public nuisance claims.

5 But, finally, and most importantly -- and this is where
6 I think Mr. Heard gets it wrong. He's talking -- his --
7 most of his argument deals with cases addressing the
8 question of when a private party can bring a public nuisance
9 claim.

10 And there's a distinction in the law, and the Second
11 Restatement makes this clear, that a private party must show
12 a special injury different from members of the public and
13 community in order to bring a public nuisance claim.

14 So there are a lot of public nuisance claims brought by
15 private parties; for example, the *Callihan* decision that,
16 that Mr. Heard said.

17 Now, what's really significant is the Third Restatement
18 confirms this distinction. Section 8 provides -- the notes
19 to Section 8 provide the provision applies only to claims
20 for economic loss by a private party who has suffered an
21 injury, quote, distinct in kind from those suffered by
22 members affected, of the affected community in general.
23 That's, that's what Section 8 says.

24 The comment to Section 8 makes it clear, however, that
25 the provision is not intended to apply to public nuisance

1 actions brought by public officials.

2 Comment 8 says in addition to the common law claims
3 recognized here, public officials may bring civil or
4 criminal actions against a defendant who creates a public
5 nuisance. The definition of a public nuisance for those
6 purposes tends to be considerably broader than the common
7 law definition recognized by this section as a basis for a
8 private suit.

9 So that -- it's very clear that the Third Restatement
10 keeps and recognizes this distinction between private -- or
11 public nuisance claims brought by private parties and public
12 nuisance claims brought by public entities.

13 You know, he, he points out that we have lots of
14 different -- he tries to characterize this case as an
15 amalgamation of a bunch of different product claims.

16 But if you take his argument, every governmental public
17 nuisance claim can be broken down for amalgamation of
18 injuries to members of the public.

19 Take contamination for example, individuals who
20 directly suffer property damage from hazardous waste spills
21 on their property. But the fact that those spills are
22 creating a hazard to the public doesn't take those cases
23 outside the realm of a public nuisance action.

24 The abatement remedy to clean up that action to stop
25 the continued harm to the public doesn't take those claims

1 outside the realm of a public nuisance action. That's what
2 governments do. They look at the injury to the public and
3 take the action to abate that injury by getting rid of the
4 harmful conditions that, that the, that the public nuisance
5 has caused. In this case, a large part of that is treatment
6 of the opioid epidemic to stop the harm to the public.

7 The difference between asbestos and other personal
8 injuries or those sorts of claims, it's different because if
9 I get an asbestos disease, my disease -- the effects of my
10 disease are generally limited to my immediate household.

11 What this epidemic has caused is a, a destruction of a
12 community which implicates the public's right to health,
13 safety, et cetera. And I want to go and talk about some of
14 the factual testimony that Mr. Lane [sic] blew through.

15 Gina, bring up -- let's start with slide -- let's just
16 go through the slides. Let's start with Slide 1.

17 Okay. Jan Rader, the Chief of the Huntington Fire
18 Department, says, "There's not one person in this area that
19 I know of that has not been touched or had collateral
20 damage. It is horrendous." She described it as a war zone
21 for first responders. It is a war zone for children, that
22 they all know growing up -- all they know growing up is
23 death and destruction.

24 Go to Slide 2.

25 Mr. Lemley, a former member of the City's Office of

1 Drug Control Policy: "The opioid epidemic has affected
2 every aspect of what we do in Huntington. It's
3 socioeconomic. It affects the university. It affects our
4 medical community. It affects our quality of life and our
5 parks. It affects our first responders. It affects our
6 property values."

7 Go to Slide 3.

8 Mr. Merry, the Director of the EMS -- and Mr. Lane
9 [sic] read from some of this. But I -- and, and he's,
10 he's -- Mr. Lane [sic] is right. There is trauma that is --
11 that the EMS and the police and fire have gone through
12 because of dealing with the consequences of this opioid
13 epidemic.

14 But when you have the, the, the very public officials
15 that, whose job it is to protect the public who are facing
16 trials, who are quitting jobs early, and that's what the
17 testimony says, that, that, that the opioid epidemic is
18 running off the people whose job it is to protect the
19 public.

20 The public has a right to have their public officials
21 that are protecting them, their health and their safety,
22 free from the, these kind of stresses that distract them
23 from otherwise doing their job.

24 Let's go to Slide -- let's skip Slide 4 and go to Slide
25 5.

1 Dr. McGuire is one of our experts and let's talk about
2 that. I think he gives a good description of one of the
3 other ways that this epidemic affects the public.

4 He says, "One pernicious and impossible-to-miss harm
5 from the opioid epidemic is neighborhood blight, the
6 degradation of neighborhoods contaminated by drug sellers,
7 drug users, and crime. The association between crime, empty
8 homes, and neighborhood decline is widely documented. Homes
9 and neighborhoods in the Cabell Huntington community have
10 been severely adversely affected by the opioid epidemic with
11 hundreds of homes demolished due to abandonment, crime, and
12 uninhabitability."

13 "The opioid epidemic degrades neighborhoods along many
14 dimensions. Risk of crime, loss of safe public space, loss
15 of connection with neighbors and other harms interfere with
16 residents' ability to appreciate where they live.
17 Degradation lowers home property values and lowers
18 residents' valuation of parks, public transportation,
19 schools, and other local public services."

20 Now, Mr. Lane [sic] was explaining that what
21 differentiates these other public nuisances from the opioid
22 epidemic is that it affects, affects people's ability to go
23 out in public spaces.

24 As Dr. McGuire testified, and anyone who has had any
25 kind -- I know Your Honor has lived in the middle of the

1 opioid epidemic down in southern West Virginia. The
2 degradation to these public spaces, that is exactly the kind
3 of problem that Mr. Heard is saying causes burdens on the
4 public.

5 Go to Slide 6, Gina.

6 Lastly, we can't omit the public interest in our
7 children and the education of our children.

8 Dr. Keyes, one of our other experts, is going to
9 testify that children in the Cabell Huntington community are
10 expected to experience a large burden of psychiatric
11 disorders and learning disorders throughout pre-school and
12 school-age developmental periods due to in-utero exposure to
13 opioids, as well as parental opioid use during development.
14 The burden of parental and caregiver opioid use to children
15 in the Cabell Huntington community is on-going and
16 significant, disrupting the home as well as the learning
17 environment.

18 So the opioid effect, like pollution, like air
19 pollution, like noise, is not just limited to those directly
20 impacted. It's -- it expands to their children. And
21 because those children have problems in our school system
22 and our public services system, it impacts the children of
23 those who aren't even, who aren't even directly impacted by
24 the opioid crisis because it burdens the educational system.

25 That is the kind of public right, the right to

1 education and, in fact, the right to education is a
2 fundamental right under our state constitution that is
3 burdened by this opioid epidemic.

4 These are public rights. These are not individual
5 claims for property damage. They're not individual claims
6 for personal injuries, those claims that we have gotten rid
7 of in this case. Our claim is seeking to, to correct the
8 public impacts the scourge of the opioid epidemic has on our
9 community.

10 So, finally, I want to just deal with generally West
11 Virginia public nuisance law. And let's look at what the
12 cases actually say.

13 First of all, none of the cases say that, that we have
14 to have a, have to have some link to land. None of the
15 cases say products are excluded.

16 The cases define public nuisance in a broad sense. In
17 *Duff*, for example, the Supreme Court said a public nuisance
18 is an act or condition that unlawfully operates to hurt or
19 inconvenience an indefinite number of parties.

20 The Restatement which is adopted by a number of
21 decisions applying West Virginia law says that interference
22 with public rights that involve a significant interference
23 with the public health, the public safety, public peace, the
24 public comfort, the public convenience, that is what an
25 interference with a public right is under the Second

1 Restatement test.

2 Numerous cases we've cited, *Kermit Lumber, Rhodes vs.*
3 *DuPont*, they all stand for the proposition that interfering
4 with public health constitutes a public nuisance.

5 Now, again, Mr. Lane [sic] is back to his distinction
6 between these -- the, the things like epidemic, like
7 epidemics or hog farms, those sorts of, those sorts of
8 things.

9 I would submit to you those distinctions matter more in
10 the context of a private person bringing a public nuisance
11 claim. Where the, where we are dealing with the public
12 governmental entity that has an interest in, in the peace
13 and security and safety of a community, those distinctions
14 are as important as, as the Third Restatement and the Second
15 Restatement recognizes.

16 You know, so, let's take infectious disease. An
17 infectious disease is, is no different than the epidemic
18 that's caused here.

19 As I, as I demonstrated with the factual testimony, the
20 opioid epidemic infects the community not directly in terms
21 of disease, but infects the community in a manner that, that
22 creates interference with public rights.

23 It's -- an infectious disease is still a collection of,
24 of individuals who are sick. But because of the, the
25 presence of a condition that impacts the public level as a

1 whole, that is what differentiates a public right that is
2 recognizable in public nuisance cases.

3 The final point I would make, and that is the
4 Controlled Substances Act has been totally ignored by
5 Mr. Lane [sic]. Now, Mr. Lane [sic] started off his
6 discussion, as the distributors do in all this case, talking
7 about the fact that the pharmacies are licensed, they are
8 licensed, the prescriptions were issued by doctors.

9 But what differentiates this case from some of the gun
10 cases and some of the lead paint cases and some of the
11 (video inaudible) keep talking about conduct that -- and we
12 had this argument last time, that violates the Federal
13 Controlled Substances Act.

14 The Controlled Substances Act places duties on these
15 very defendants to stop the, the harms that were caused by
16 the use of opioids for other than medical purposes.

17 Diversion under the Controlled Substances Act is
18 foreseeable. And I'm not going to restate the argument we
19 had last time, but that is the distinction.

20 And the fact that the defendants sold massive
21 quantities of drugs to licensed pharmacies who then filled
22 prescriptions issued by pill mill doctors doesn't immunize
23 them from their responsibility under the Controlled
24 Substances Act to stop suspicious orders and prevent
25 diversion. And the reason for that is because it's

1 foreseeable that these harms to the public would occur.

2 So for those reasons, unless Your Honor has any
3 questions, that's all we have today.

4 THE COURT: Thank you, Mr. Majestro.

5 Mr. Heard, do you want to respond to any of this?

6 MR. HEARD: Yes, Your Honor, three points.

7 First, on the question of authority and what is good
8 authority, I heard Mr. Majestro say several times that the
9 authority he is citing is persuasive. Persuasive authority
10 has reasoning that provides reasons for the conclusion.

11 The second point, the Circuit Court authority that they
12 cited contains no reasoning. The 25 non-West Virginia cases
13 that are cited in their table of authorities, not one of
14 them contains any reasoning distinguishing between a public
15 and private right.

16 The plaintiffs cannot have it both ways. They can't
17 say, as Mr. Majestro did, that these cases apply the
18 Restatement test in 821B and, at the same time, ignore the
19 fact that none of these decisions address the very
20 definition that the Restatement gives in back-to-back
21 sentences.

22 A public right is a right held in common. It is not
23 the private right that everyone has not to be negligently
24 injured. If they don't make that distinction, they are not
25 persuasive.

1 And I'm perfectly happy for Your Honor to read all of
2 those non-West Virginia cases they cited. If Your Honor
3 meets the intellectual challenge of coming to terms with
4 that difference, you will be only the second case.

5 And the first case is the *Brooke County* case which
6 applied the Illinois Supreme Court decision Your Honor
7 referred to which got this distinction right.

8 The second thing I would say, Your Honor, is we're not
9 citing the Restatement (Third) because we say the West
10 Virginia Supreme Court would adopt it. We're citing the
11 Restatement (Third) for the statement of fact that the
12 Restatement makes. And it says liability on such theories,
13 that is, product-based theories, has been rejected by most
14 courts.

15 Even if Your Honor disregards that statement in the
16 Restatement (Third), the Delaware Court in the opioid
17 litigation said the same thing. Quote: "There is a clear
18 national trend to limit public nuisance to land use."

19 I ask Your Honor to look at that Fourth Circuit
20 decision in *Rhodes vs. DuPont* for a second reason. That
21 case involved contamination of the water supply of
22 Parkersburg and contained both a private and public nuisance
23 claim.

24 If Your Honor wants to come to grips with whether
25 something interferes with a public or private right, and

1 whether the so-called destruction of the community makes
2 this a public nuisance case, *Rhodes* indicates the proper
3 line of analysis.

4 In that case the plaintiffs, in support of their
5 private nuisance claim said, yes, DuPont put chemicals into
6 the public water supply, but that public water got pumped
7 into our private homes and, therefore, that supports a
8 private nuisance claim.

9 And the Fourth Circuit said, no, that analysis is
10 entirely mistaken. The point of first impact where the
11 contamination first affected, first interfered is with the
12 public water supply. And, so, that point of first impact
13 defines this nuisance as a public nuisance because it's
14 interfering with a public right.

15 In that same way, distribution of opioids clearly
16 affects in the first instance and has its immediate first
17 impact on the persons who are addicted and suffer personal
18 injury. It's only secondarily that the first responders and
19 healthcare providers and children suffer emotional trauma.
20 And it's only third-hand that property values are supposedly
21 affected.

22 And (video inaudible) in the first instance, this is
23 all about personal injury, about addiction, is that
24 80 percent of the remedy that plaintiffs seek is for a
25 remedy for personal injury. They're seeking two billion

1 dollars out of 2.6 to provide addiction treatment for the
2 people personally injured.

3 The last point, Your Honor, is this. Mr. Majestro
4 mentions the Controlled Substances Act. The Restatement
5 says in Comment E that a violation of statute or regulation
6 or ordinance may provide the basis for a public nuisance
7 claim where the statute or ordinance brands the conduct as a
8 public nuisance.

9 No West Virginia statute or regulation, no ordinance of
10 Cabell or Huntington, nor the CSA, brands the distribution
11 of opioids as a public nuisance. And, in fact, this is an
12 argument the plaintiffs don't even make in their opposition,
13 just resurrecting it today.

14 So at the end, I would simply say there is the old
15 adage with which you're all familiar: Hard cases make bad
16 law. Before today I looked back to see what the original
17 meaning of that term was. You know, there's a tendency to
18 bend the law when there are sympathetic plaintiffs. But
19 when that happens, hard cases make bad law.

20 And, in fact, the authority that the plaintiffs cite in
21 their brief, not one of them addressed the fundamental
22 distinction in the Restatement definition. It's a
23 give-away.

24 But so far, the sympathetic case that makes for bad
25 law, there's a fundamental distinction between public and

1 private right. It's not implicated here. And the
2 defendants are entitled to summary judgment.

3 Thank you.

4 THE COURT: Let's take a break before we go to the
5 proximate cause issue. We'll be in recess for five or ten
6 minutes and then we'll come back and look at the other
7 issues before the Court today.

8 (Recess taken from 12:09 p.m. until 12:20 p.m.)

9 THE COURT: All right, we're ready to go back on
10 the record in the Cabell County cases, and the next issue is
11 the proximate cause issue.

12 And, Mr. Hester, I believe it's your turn to bat.

13 MR. HESTER: Yes. Thank you, Your Honor. I guess
14 early good afternoon to you.

15 This motion turns on the requirements of West Virginia
16 law that proximate causation cannot be established if the
17 chain of causation leading to the alleged harm is remote.

18 The plaintiffs don't dispute the facts that bear on
19 this remoteness issue. They do not contest that their
20 alleged harm from defendants' distribution of opioids occurs
21 only after a doctor prescribes opioids, a pharmacist
22 dispenses opioids, a third party illegally diverts opioids,
23 and a third party uses opioids illegally.

24 Now, the plaintiffs' brief discusses three different
25 categories of evidence relating to their alleged harm. But

1 the important point is that none of that evidence disputes
2 this four-step chain of causation.

3 The plaintiffs point to a flood or an excessive supply
4 of opioids. They point to correlations between opioid
5 volumes and opioid harms. And they point to a failure to
6 control for suspicious orders which they allege led to an
7 excessive volume of opioids.

8 Those are all contested factual issues, Your Honor.
9 But the essential point for purposes of this motion is that
10 none of this evidence creates an issue of fact on the
11 four-step chain of causation that I've described.

12 No matter how many pills defendants shipped, and even
13 accepting the plaintiffs' allegation that the volume is
14 excessive, the pills would have sat on a shelf harming no
15 one unless a doctor prescribes, a pharmacist dispenses, a
16 third party diverts, and a third party uses opioids
17 illegally.

18 So this four-step causal chain for plaintiffs' theory
19 of harm from the distribution of opioids is undisputed. The
20 only remaining question is over the legal standard that
21 applies to this undisputed chain of causation.

22 And the West Virginia Supreme Court has made clear that
23 remoteness is an essential element of proximate causation
24 under West Virginia law. It's set forth clearly in the
25 *Aikens* decision. Quote: "Remoteness is a component of